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18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA

20 JIPC MANAGEMENT, INC.,

21 Plaintiff,

22 v.

23 INCREDIBLE PIZZA CO., INC.;
24 INCREDIBLE PIZZA FRANCHISE
GROUP, LLC; CJM RACING, LLC.,

25 Defendant.
26
27
28

Case No. CV08-4310 MMM (PLAx)

**PLAINTIFF JIPC
MANAGEMENT, INC.'S OFFER
OF PROOF RE BAD FAITH
INTENT IN ADOPTING IPC
MARKS**

Hon. Margaret M. Morrow

1 Pursuant to the Court's Minute Order, dated July 14, 2009, addressing
2 Defendants' Motion in Limine No. 8 regarding alleged "bad faith" preceding
3 Plaintiff's claims, JIPC Management, Inc. respectfully submits the following offer
4 of proof regarding bad faith intent in the adoption of Defendants Incredible Pizza
5 Co., Inc. and Incredible Pizza Franchise Group, LLC's marks.¹

6 **A. Incredible Pizza Co. (and Design) Mark.**

7 1. Witness Testimony.

8 a. Plaintiff will offer John Parlet, Founder and CEO of JIPC
9 Management, Inc., to testify that:

- 10 (1) in the late 1980s or early 1990s, Parlet struck up a professional
11 friendship with Rick Barsness;
- 12 (2) at the time Parlet owned pizza restaurants in California;
- 13 (3) at the time Barsness was a Mr. Gatti's pizza restaurant
14 franchisee in Texas;
- 15 (4) Parlet and Barsness would talk from time to time about the
16 family pizza restaurant industry and their businesses;
- 17 (5) in or about 1995, Parlet decided to launch a new restaurant and
18 entertainment venture under the name "John's Incredible Pizza
19 Co.";
- 20 (6) the John's Incredible Pizza Co. name was selected independent
21 of, and without any input, involvement or discussion with,
22 Barsness;
- 23 (7) after the name was selected, Parlet mentioned his plans for the
24 John's Incredible Pizza Co. name and concept to Barsness;

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26
27 ¹ Defendants' Motion in Limine only sought to exclude "evidence of bad
28 faith before 2008" and did not challenge the relevance or admissibility of evidence
of bad faith from 2008 to the present. Accordingly, JIPC has limited this offer of
proof to the pre-2008 evidence of bad faith adoption that JIPC intends to offer.

- 1 (8) from time to time thereafter, Parlet updated Barsness on the
2 progress of Parlet's plans for the first John's Incredible Pizza
3 Co. in Victorville, CA;
- 4 (9) Barsness visited the Victorville store soon after it opened in
5 September 1997;
- 6 (10) Barsness would have seen that the Victorville store offered an
7 all-you-can-eat pizza, pasta, salad, and dessert buffet, themed
8 dining rooms, and a large entertainment area with video and
9 redemption games;
- 10 (11) Barsness would have seen the use of John's Incredible Pizza Co.
11 on the exterior and throughout the interior of the Victorville store;
- 12 (12) Barsness asked Parlet about, and Parlet shared, how well things
13 were going with the Victorville store and the positive financial
14 numbers Parlet was seeing early on;
- 15 (13) information Parlet shared with Barsness included revenue
16 numbers the Victorville store was generating, which exceeded
17 \$1.1 million in the first three months of operations alone;
- 18 (14) from 1997 through 1999, Parlet repeatedly told Barsness about
19 Parlet's plans to expand John's Incredible Pizza Co.;
- 20 (15) for example, in 1998, Parlet wrote Barsness about Parlet's plans
21 for: (a) a second store in Bakersville, CA; (b) incorporating an
22 "Incredible Photo Studio" into the store; and (c) using a mobile
23 ticket booth that "will have John's Incredible Pizza Co. signage
24 very visible" at all times;
- 25 (16) in 1999, Barsness asked Parlet if Barsness could purchase some
26 pizza sauce and crust recipes because Barsness planned to
27 terminate his franchise relationship with Mr. Gatti's and open
28

1 his own pizza buffet restaurant and wanted to have some recipes
2 that did not originate with Mr. Gatti's;

3 (17) Parlet agreed to sell Barsness some recipes, unaware that
4 Barsness was planning to use the "Incredible Pizza Co." name in
5 connection with his own pizza buffet restaurant;

6 (18) in Spring 1999, Barsness sent Larry Abbe, the manager of
7 Barsness's Abilene, TX Mr. Gatti's franchise to the Victorville
8 store to pick up the recipes;

9 (19) Abbe travelled back to the Victorville store with Ron Jones, the
10 manager of the Victorville store, after the International Pizza
11 Expo show held each Spring in Las Vegas, Nevada;

12 (20) Abbe spent four to five days at the Victorville store training on
13 John's Incredible Pizza Co. recipes;

14 (21) in or about October 1999, Parlet heard a rumor, possibly from
15 Wendell Cannon, the vendor who set up the Victorville store's
16 game room, that Barsness had plans to open a restaurant in
17 Texas using the "Incredible Pizza Co." name;

18 (22) Parlet immediately called Barsness and vehemently objected to
19 Barsness use of the name;

20 (23) Parlet stated that John's Incredible Pizza Co. was his name and
21 demanded that Barsness pick his own name;

22 (24) Barsness responded by saying "Well, I'm sorry, I didn't think
23 you'd mind";

24 (25) Barsness claimed it was too late to change the name because he
25 had already purchased signs;

26 (26) prior to the call between Parlet and Barsness in or about October
27 1999, Parlet and Barsness had never talked about or discussed
28 Barsness's use of the Incredible Pizza Co. name in any form;

- 1 (27) in or about early May 2000, Parlet received a call from
2 Barsness;
3 (28) at the beginning of the call Barsness asked how the third John's
4 Incredible Pizza Co. store in Fresno, CA was going;
5 (29) later in the call Barsness asked Parlet whether they needed "to
6 talk anymore about the name issue";
7 (30) Parlet reiterated that John's Incredible Pizza Co. was his name,
8 that Parlet could expand nationwide, and demanded again the
9 Barsness pick another name;
10 (31) Barsness asked Parlet if Parlet would agree to give Barsness
11 some part of the country where Barsness could use the name,
12 but Parlet refused;
13 (32) Barsness assured Parlet that Barsness was seriously considering
14 changing the name;
15 (33) Barsness never mentioned to Parlet in either of their telephone
16 conversations that Barsness had filed an application to register
17 Incredible Pizza Co. as a trademark.

18 In further support of its offer of proof, JIPC submits excerpts from the
19 following prior testimony provided by Mr. Parlet: deposition taken on
20 June 2, 2000 (attached as Exhibit 1); declaration executed July 3, 2008
21 (attached as Exhibit 2); and declaration executed May 11, 2009
22 (attached as Exhibit 3).²

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28 ² In each exhibit, the relevant testimony is indicated with underscoring.

- 1 b. Plaintiff will offer Rick Barsness, Founder and CEO of Incredible
2 Pizza Co., Inc., through excerpts of depositions taken on May 24, 2000
3 (Attached as Exhibit 4); March 30, 2005 (Attached as Exhibit 5);
4 August 24, 2007 (Attached as Exhibit 6); and November 6, 2007
5 (Attached as Exhibit 7), to testify that:
- 6 (1) in the 1990s, Barsness was a Mr. Gatti's pizza restaurant
7 franchisee in Texas;
 - 8 (2) in the early to mid 1990s Barsness met Parlet;
 - 9 (3) Barsness and Parlet developed a professional friendship and
10 they would talk from time to time about the family pizza
11 restaurant business;
 - 12 (4) in the mid-1990s, Barsness came to learn that Parlet had plans to
13 open a pizza buffet and entertainment center using the name
14 John's Incredible Pizza Co.
 - 15 (5) Barsness understood that the John's Incredible Pizza Co.
16 concept Parlet was developing involved an all-you-can-eat
17 buffet of pizza, salad, pasta, and deserts, as well as a game room
18 and ride component.
 - 19 (6) Barsness was aware of Parlet's plans to open the Victorville
20 John's Incredible Pizza Co. store before it opened;
 - 21 (7) Barsness visited the Victorville store shortly after it opened;
 - 22 (8) when Barsness visited the Victorville store there was a buffet
23 featuring pizza, pasta, salad and dessert, as well as an
24 entertainment center with video, arcade and redemption games;
 - 25 (9) in early 1998 Barsness began selling off his Mr. Gatti's
26 franchises and preparing to open his own restaurant;
 - 27 (10) by November 1998 Barsness had decided to use Incredible Pizza
28 Co. as the name of his new restaurant;

- 1 (11) there was no reason why Barsness had to use Incredible Pizza
2 Co. as his brand name and nothing required him use the name;
3 (12) Barsness was aware that he could have chosen other names, but
4 never considered any name other than Incredible Pizza Co.;
5 (13) in October 1998 Barsness began working with a graphic
6 designer on an Incredible Pizza Co. logo;
7 (14) Barsness purchased John's Incredible Pizza Co. recipes from
8 Parlet because he wanted to have recipes that he could prove
9 came from somewhere other than Mr. Gatti's;
10 (15) Barsness asked Abbe to travel to the Victorville John's
11 Incredible Pizza Co. to pick up the recipes;
12 (16) Abbe spent three to four days at the Victorville store and, upon
13 his return, Barsness is sure that he discussed with Abbe what
14 Parlet was doing in the Victorville store;
15 (17) Barsness's last remaining Mr. Gatti's franchises were in
16 Amarillo, TX;
17 (18) there were two Amarillo, TX Mr. Gatti's locations, a sit-down
18 restaurant and a take-out and delivery store;
19 (19) the two Amarillo locations were owned by Barsness and his
20 wife, Cheryl Barsness, through their holding company, RPM
21 Productions, Inc.
22 (20) the Amarillo franchises were to expire on October 14, 1999;
23 (21) in Spring 1999, Barsness asked Mr. Gatti's to approve the
24 transfer of the Amarillo franchises to Madison Scott;
25 (22) in late Summer 1999, Mr. Gatti's refused to approve the transfer
26 to Scott;
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- 1 (23) at that point, the Barsnesses made the decision to allow the
2 Amarillo Mr. Gatti's franchises expire and convert the stores to
3 Incredible Pizza Co.;
- 4 (24) On September 21, 1999, Barsness filed an application to register
5 Incredible Pizza Co. (and design) with the USPTO for restaurant
6 services;
- 7 (25) in his declaration in support of the application, Barsness stated,
8 under penalty of perjury, that to the best of his "knowledge and
9 belief no other person, firm, corporation or association had the
10 right to use the said mark in commerce, either in the identical
11 form or in such near resemblance thereto as may be likely, when
12 applied to the goods of such other person, to cause confusion."
- 13 (26) at the time Barsness executed the declaration, he was aware that
14 Parlet was using John's Incredible Pizza Co. and had the right to
15 use the name;
- 16 (27) Barsness did not contact Parlet and advise him that Barsness
17 was filing an application to register Incredible Pizza Co. (and
18 design);
- 19 (28) around the time Barsness and Scott began discussing the sale of
20 the Amarillo locations to Scott as Incredible Pizza Co., Mr.
21 Gatti's approved the transfer of the Amarillo franchises to Scott;
- 22 (29) Barsness claims it was Scott's preference to be an Incredible
23 Pizza Co. rather than a Mr. Gatti's franchise;
- 24 (30) it was Barsness's preference that Scott be an Incredible Pizza
25 Co. because Barsness was upset with Mr. Gatti's and didn't
26 want them to get revenue from Scott's stores;
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- 1 (31) although Barsness began the process of converting the Amarillo
2 stores from Mr. Gatti's to Incredible Pizza Co., he sold the
3 Amarillo stores to Scott before the process was complete;
- 4 (32) As part of the sale of RPM to Scott, Barsness and Scott executed
5 a "Side Letter Agreement" dated October 14, 1999.
- 6 (33) in the Side Letter Agreement, Barsness states, "you are aware
7 that someone else is operating under [the Incredible Pizza] name
8 and concept in California and possibly in other places."
- 9 (34) the "someone else" operating under that name and concept was
10 a reference to Parlet and the John's Incredible Pizza Co. stores;
- 11 (35) in the Side Letter Agreement, Barsness also states, "Specifically
12 in regard to your plans to open the Amarillo pizza restaurant as
13 an Incredible Pizza restaurant, I'm making no guarantees
14 whatsoever in regard to the use of the name 'Incredible Pizza';
- 15 (36) Barsness executed the Side Letter Agreement after Parlet had
16 called Barsness to object to Barsness's plans to use the
17 Incredible Pizza Co. name;
- 18 (37) Barsness provided the John's Incredible Pizza Co. recipes he
19 purchased from Parlet to Scott for use in the Amarillo's
20 Incredible Pizza Co. store.
- 21 (38) The Amarillo take-out restaurant did not use the Incredible Pizza
22 Co. mark in connection with the sale of goods and services
23 before October 16, 1999;
- 24 (39) By May 2000, Barsness believed there were two reasons why he
25 and Parlet were no longer friends, one of which was that
26 Barsness was using a similar name to JOHN'S INCREDIBLE
27 PIZZAZA CO. ;
28

- 1 (40) on March 23, 2001, Barsness filed a Statement of Use with the
2 USPTO in support of his application to register Incredible Pizza
3 Co. (and design);
- 4 (41) in his declaration in support of the Statement of Use, Barsness
5 stated under penalty of perjury that the mark was now in use in
6 commerce;
- 7 (42) in his declaration, Barsness also stated that “Three specimens
8 showing the marks as used in commerce are submitted with this
9 statement”;
- 10 (43) The specimens attached included stationary and business cards
11 for “Springfield’s Incredible Pizza Co.”, as well as an architect’s
12 rendering of the Springfield store;
- 13 (44) The Springfield store was not open at the time Barsness signed
14 his declaration;
- 15 (45) the Springfield store did not open until August 2002;
- 16 (46) The remaining specimens showed use of the Amarillo’s
17 Incredible Pizza Co mark by Scott’s Amarillo’s Incredible Pizza
18 Co.;
- 19 (47) the declaration was prepared by Barsness’s lawyers for his
20 signature;
- 21 (48) Barsness did not understand the declaration at the time he
22 executed it;
- 23 (49) Barsness does not recall reviewing the declaration for accuracy
24 or asking his attorneys what the declaration meant;
- 25 (50) Barsness believes he probably just glanced at the document,
26 assumed it was correct and signed it;
- 27
28

1 (51) Barsness does not recall whether at the time he executed his
2 declaration he brought to anyone's attention the fact that the
3 Springfield store was not open.
4

5 c. Plaintiff will offer Madison Scott, owner of Amarillo's Incredible
6 Pizza Co., Inc., in person and/or through excerpts of depositions taken
7 on November 3, 1999 (Attached as Exhibit 8); December 13, 2001
8 (Attached as Exhibit 9); and April 11, 2005 (Attached as Exhibit 10),
9 to testify that:

- 10 (1) in 1999 Scott entered discussions with Barsness to purchase
11 Barsness's Amarillo, Texas Mr. Gatti's franchises;
12 (2) Scott applied to Mr. Gatti's to be approved as transferee of the
13 Amarillo Mr. Gatti's franchises.
14 (3) In or about early August 1999, Mr. Gatti's indicated that it
15 would not approve Scott as a transferee;
16 (4) Scott's discussions with Barsness closed down around August 3,
17 1999;
18 (5) on October 1, 1999, Rick Barsness called Scott and told him that
19 Mr. Gatti's had reconsidered approving Scott as a franchisee;
20 (6) Barsness also told Scott that Barsness had his own great concept
21 he had been working on for two years that Scott might want to
22 consider;
23 (7) after the call Barsness came to town and told Scott that there
24 was something out of California called John's Incredible Pizza
25 Company and Barsness was thinking himself of doing an
26 Incredible Pizza Company;
27
28

- 1 (8) Barsness told Scott that he had drawings, architecture, and
2 recipes all ready to go and could transfer the concept over to
3 Scott for \$2.7 million;
- 4 (9) Barsness told Scott Barsness had been working with Parlet in
5 California and that John's Incredible Pizza Co. was doing
6 extremely well in California, and had grown to four stores;
- 7 (10) Barsness told Scott that Parlet's sales that were much better than
8 Mr. Gatti's;
- 9 (11) it was Scott's preference to operate the Amarillo locations as a
10 Mr. Gatti's rather than as an Incredible Pizza Co.
- 11 (12) Barsness told Scott that Barsness would not provide financing if
12 Scott operated as a Mr. Gatti's;
- 13 (13) Barsness promised Scott that he would give Scott a delicious
14 pizza recipe and "this great business" from John's Incredible
15 Pizza Co.
- 16 (14) Barsness assured him that he had a great recipe and that Abbe
17 would come up from Abilene to train Scott on the recipe;
- 18 (15) Scott had to make a decision be October 14, 1999, when the
19 Barsness's Mr. Gatti's franchises were set to expire.
- 20 (16) Scott knew Wendell Cannon, a game room vendor who took
21 care of the John's Incredible Pizza Co. game rooms;
- 22 (17) Cannon told Scott that John's Incredible Pizza Co. was a great
23 company, that Parlet did real well, and that it should be a good
24 operation for Scott;
- 25 (18) Scott understood that Barsness's reference in the Side Letter
26 Agreement to someone else operating under the Incredible Pizza
27 name and concept in California meant John's Incredible Pizza
28 Co.

- 1 (19) the first day the delivery store was open to the public under the
2 name Incredible Pizza Co. was October 16, 1999;
3 (20) the sit-down store closed for conversion and did not first operate
4 under the name Incredible Pizza Co. under November 2, 1999;
5 (21) Scott, not Barsness, paid the costs of converting the Amarillo
6 stores from Mr. Gatti's to Amarillo's Incredible Pizza Co.
7 (22) after the Amarillo store opened, Ron Jones, the manager of the
8 Victorville JOHN'S INCEDIBLE PIZZA CO. told Scott on
9 more than one occasion that Parlet objected to Scott's using the
10 name Incredible Pizza Co.
11

12 d. Plaintiff will offer Larry Abbe, President of Incredible Pizza Co., Inc.,
13 through excerpts of depositions taken on March 30, 2005 (Attached as
14 Exhibit 11) and November 6, 2007 (Attached as Exhibit 12), to testify
15 that:

- 16 (1) From 1993 through 1998, Abbe was manager of Barsness's
17 Abilene, Texas Mr. Gatti's franchise;
18 (2) sometime in the late 1990s, Abbe received a call from Barsness,
19 who said that he wanted Abbe to go to the Victorville John's
20 Incredible Pizza Co. to pick up recipes;
21 (3) Barsness said that if Barsness was going to do a new concept, he
22 needed to have some recipes and that he had purchased recipes
23 from Parlet;
24 (4) Abbe was scheduled to go out to the annual pizza show in Las
25 Vegas for three days;
26 (5) Abbe met up with Jones, who drove him back to Victorville;
27 (6) Abbe spent five to seven days at the Victorville store and
28 gathered the recipes.

1
2 d. Plaintiff will offer Ron Jones, Manager, Victorville John's Incredible
3 Pizza, 1998-1999, to testify that:

4 (1) in late 1998 or early 1999, Abbe came in to the Victorville store
5 to learn recipes being used at John's Incredible Pizza Co.

6 (2) Abbe spent about a week in Victorville.

7 In further support of its offer of proof, JIPC submits excerpts from the
8 following prior testimony provided by Mr. Jones: deposition taken on
9 June 2, 2000 (attached as Exhibit 13, and deposition taken on April 1,
10 2005 (attached as Exhibit 14.)

11
12 2. Documents

13 a. Undated Letter from John Parlet to Rick Barsness (attached as Exhibit
14 23), to establish Barsness's knowledge of use of "John's Incredible
15 Pizza Co." mark and plans to expand.

16 b. Letter from Karen Munger to Rick Barsness, dated October October
17 19, 1998 (see Exhibit 5 (attached as deposition exhibit 2 to Barsness
18 testimony)), to establish that development of Incredible Pizza Co. (and
19 design) began in late 1998.

20 c. Letter from Karen Munger to Rick Barsness, dated November 4, 1998
21 (see Exhibit 5 (attached as deposition exhibit 3 to Barsness
22 testimony)), to establish that development of Incredible Pizza Co. (and
23 design) began in late 1998.

24 d. Application to Register "Incredible Pizza Co. (and design)," dated
25 September 21, 1999, (see Exhibit 6 (deposition exhibit P-238 attached
26 to Barsness testimony)), to establish design of original Incredible Pizza
27 Co. (and design) logo and Barsness's false statements to the USPTO
28 regarding ownership and JIPC's prior rights.

- 1 e. Stock Purchase Agreement by and among The Amarillo Incredible
2 Pizza Company and Richard and Cheryl Barsness for all of the
3 outstanding stock of RPM Productions, Inc., dated October 14, 1999
4 (see Exhibit 29 (exhibit P-243 to Barsness testimony)), to establish that
5 the Barsnesses sold all the shares of RPM, their holding company, to
6 Scott.
- 7 f. Side Letter Agreement between Rick and Cheryl Barsness and
8 Madison and D’Nan Scott, dated October 14, 1999 (see Exhibit 5
9 (deposition exhibit 1 attached to Barsness testimony)), to establish
10 Barsness’s knowledge of JIPC’s prior use and rights in John’s
11 Incredible Pizza Co. and sale of stock in RPM to Madison Scott.
- 12 g. Statement of Use, dated March 23, 2001 (see Exhibit 6 (exhibit P-239
13 attached to Barsness testimony)), to establish Barsness’s false
14 statements regarding use of Incredible Pizza Co. (and design) in
15 commerce.
- 16 h. Request for Amendment to Trademark Registration, dated October 21,
17 2003 (attached as Exhibit 15), to show admission by IPC that the
18 following changes to the Incredible Pizza Co. (and design) mark do
19 not constitute a material alteration: substituting the wording
20 “Company” for “Co.,” changing the typestyle of the term “Incredible”
21 and the wording “Great Food, Fun, Family, & Friends” and adding “an
22 elliptical shape” at the very bottom of the mark.
- 23 i. Response to Petitioner’s First Set of Requests for Admission to
24 Registration, dated January 18, 2005 (attached as Exhibit 20), to
25 establish:
- 26 (1) that Barsness was aware as of October 20, 1999 of JIPC’s use of
27 the name “John’s Incredible Pizza Company”; and
28

- 1 (2) that the Side Letter Agreement contained no provision for the
2 exercise of control by Barsness over the goods and services to
3 be offered at the Amarillo stores.
- 4 j. Response to Petitioner’s Second Set of Requests for Admission to
5 Registrant, dated March 17, 2005 (attached as Exhibit 21), to establish:
- 6 (1) IPC’s claim that as of the time it adopted the Incredible Pizza
7 Co. (and design), “it had no trademark rights in the merely
8 descriptive phrase “Incredible Pizza Company” standing
9 alone.”;
- 10 (2) the terms of any alleged license granting to Madison Scott the
11 right to use the Incredible Pizza Co. (and design) mark in
12 Amarillo were not reduced to writing at any time between 1999
13 and 2003.
- 14 k. Response to Petitioner’s Third Set of Requests for Admission to
15 Registrant, dated September 30, 2005 (attached as Exhibit 22), to
16 establish:
- 17 (1) The Amarillo take-out store did not use Incredible Pizza Co.
18 (and design) in connection with actual sales of goods and
19 services before October 16, 1999;
- 20 (2) The Amarillo sit-down store did not use Incredible Pizza Co.
21 (and design) in connection with actual sales of goods and
22 services before November 2, 1999;
- 23 //
- 24 //
- 25 //
- 26 //
- 27 //
- 28 //

1 **B. Incredible Pizza Company Mark.**

2 In addition to the evidence set forth above, JIPC intends to offer the
3 following evidence:

4 1. Documents

5 a. Application to Register “Incredible Pizza Company,” dated September
6 15, 2003 (attached as Exhibit 6 (exhibit P-238 to Barsness testimony)),
7 to establish that:

8 (1) On September 15, 2003, IPC filed an application to register the
9 standard character mark “Incredible Pizza Company” with the
10 USPTO;

11 (2) in his declaration in support of the application Barsness stated
12 under penalty of perjury that IPC was using the “Incredible
13 Pizza Co.” mark in commerce and to the best of his “knowledge
14 and belief no other person, firm, corporation or association had
15 the right to use the said mark in commerce, either in the
16 identical form or in such near resemblance thereto as may be
17 likely, when applied to the goods of such other person, to cause
18 confusion.”

19 b. Applicant’s Response to Opposer’s First Set of Requests for
20 Admission, dated December 11, 2006 (attached as Exhibit 16), to
21 establish IPC’s claim that as of April 2004, “it had no trademark rights
22 in the merely descriptive phrase “Incredible Pizza Company” standing
23 alone.

24 c. Uniform Franchise Offering Circular (“UFOC”) of Incredible Pizza
25 Franchise Group, LLC, dated September 17, 2003 (excerpts attached
26 as Exhibit 17), to establish that:

27 (1) in the section captioned “THE FRANCHISOR, ITS
28 PREDECESSORS AND AFFILIATES”, IPFG states “We are in

1 the business of franchising family entertainment centers
2 including an all-your-can-eat high quality buffet, 50's themed
3 dining, private party rooms and fairgrounds containing games,
4 rides and attractions for all ages of the family. These family
5 entertainment centers ("FEC" or "FECs") will operate under the
6 name 'Incredible Pizza Company' and other names and marks
7 we authorize (the 'Marks').";

8 (2) in the section captioned "TRADEMARKS", IPFG states "We
9 are aware of a company in California, John's Incredible Pizza
10 Co., which may have operated under the name 'John's
11 Incredible Pizza Company' prior to our use of our Mark and this
12 company may be able to prevent us from operating or
13 franchising FECs in certain areas in which this company is
14 operating, which we understand consists of parts of California.";

15 d. Applicant's Response to Opposer's Second Set of Requests for
16 Admission, dated April 11, 2007 (attached as Exhibit 18), to establish
17 IPC's contention that it was not aware that JIPC claimed John's
18 Incredible Pizza Co. as a trademark, service mark or trade name
19 separate from the full John's Incredible Pizza Co. All You Can Eat
20 Food & Fun! (and design) mark until IPC learned of JIPC's application
21 to register in September 2004.

22 e. Applicant's Response to Opposer's Amended First Set of
23 Interrogatories, April 11, 2007 (attached as Exhibit 19), to establish
24 IPC's contention that it was not aware that JIPC claimed John's
25 Incredible Pizza Co. as a trademark, service mark or trade name
26 separate from the full John's Incredible Pizza Co. All You Can Eat
27 Food & Fun! (and design) mark until IPC learned of JIPC's application
28 to register in September 2004.

- 1 f. Rodney K. Worrel Letter to Rick Barsness, dated March 16, 2004
2 (attached as Exhibit 24), to establish defendants' knowledge as of
3 March 16, 2004 that JIPC claimed John's Incredible Pizza Co.
4 standing alone as a trademark, service mark or trade name.
- 5 g. Petition to Cancel dated May 21, 2004 (attached as Exhibit 25), to
6 establish that IPC was aware as of March 16, 2004 that JIPC claimed
7 John's Incredible Pizza Co. standing alone as a trademark, service
8 mark or trade name.
- 9 h. Notice of Publication, dated August 4, 2004 (attached as Exhibit 26),
10 to establish that IPC's application to register "Incredible Pizza
11 Company" was to be published for opposition on August 24, 2004.
- 12 i. Express Abandonment, dated August 23, 2004 (attached as Exhibit
13 27), to establish IPC's abandonment of its application to register
14 "Incredible Pizza Company" standing alone one day prior to
15 publication.

16 2. Witness Testimony

- 17 a. Plaintiff will offer Rick Barsness, Founder and CEO of Incredible
18 Pizza Co., Inc., through excerpts of depositions taken on March 30,
19 2005 (Attached as Exhibit 5); August 24, 2007 (Attached as Exhibit
20 6); and November 6, 2007 (Attached as Exhibit 7), to testify that
21 Barsness claims IPC abandoned its application to register "Incredible
22 Pizza Company" after it had been approved for publication because
23 IPC's lawyers said IPC did not need it and should stay with its
24 registered logo.

1 **C. America's Incredible Pizza Company Great Food, Fun, Family and**
2 **Friends (and design) Mark.**

3 In addition to the evidence set forth above, JIPC intends to offer the
4 following evidence:

5 1. Documents

6 a. Application to Register "America's Incredible Pizza Company Great
7 Food, Fun, Family and Friends (and design)" dated February 25, 2005
8 (attached as Exhibit 28), to establish that:

- 9 (1) On February 25, 2005, IPC filed an application to register
10 "America's Incredible Pizza Company Great Food, Fun, Family
11 and Friends (and design)" with the USPTO;
12 (2) in her declaration in support of the application Cheryl Barsness
13 stated under penalty of perjury that to the best of her
14 "knowledge and belief no other person, firm, corporation or
15 association had the right to use the said mark in commerce,
16 either in the identical form or in such near resemblance thereto
17 as may be likely, when applied to the goods of such other
18 person, to cause confusion.";

19
20 2. Witness Testimony

21 a. Plaintiff will offer Rick Barsness, Founder and CEO of Incredible
22 Pizza Co., Inc., through excerpts of depositions taken on March 30,
23 2005 (Attached as Exhibit 5); August 24, 2007 (Attached as Exhibit
24 6); and November 6, 2007 (Attached as Exhibit 7), to testify that IPC
25 applied for the America's Incredible Pizza Company trademark
26 because it was expensive and inefficient to do individualized branding
27 for each store.
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DATED: July 27, 2009

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